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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5247

BARRINGTON JOSEPH JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONER

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OPINIONS BELOW

The first Opinion of the United States Court of Appeals for the District of Columbia Circuit (A. 306) is not reported. The second Opinion of the United States Court of Appeals for the District of Columbia Circuit on Rehearing En Banc (A. 328) is reported at ___ U.S. App. D.C. ___, 426 F.2d 651 (1970).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1970 (A. 348). The Petition for Writ of Certiorari was filed by petitioner, *pro se*, on May 18, 1970 after this Court granted petitioner's request for an extension of time within which to file such Petition. The Petition, together with the Motion for Leave to Proceed in Forma Pauperis were granted on October 19, 1970 ___U.S.___; 91 S. Ct. 107 (A. 349). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether prejudicial error resulted from petitioner's conviction for the crime of rape under the provisions of 22 D.C. Code 2801 where:

   (a) an unconstitutional death sentence instruction was given to the jury (and, in other respects, this non-capital case was tried as a capital case);

   (b) the guilty verdict might have been a compromise resulting from the jury's consideration of (a) above, and

   (c) the evidence of guilt was not compelling.

2. Whether, in any event, the evidence of guilt was sufficient to sustain petitioner's rape conviction under the provisions of 22 D.C. Code 2801.

3. Whether prejudicial error resulted from the prosecutor's closing arguments commenting unfairly upon petitioner's permissible alternative defenses (i.e., (a) that no act of intercourse took place and (b) that even if the evidence established that an act of intercourse took place, the prosecution did not carry its burden of proving lack of consent.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

22 D.C. Code § 2801:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: *Provided further*, That if the jury fail to agree as to the punishment the verdict of guilty shall be received and the punishment shall be imprisonment as pro-

vided in this section. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 808; Apr. 19, 1920, 41 Stat. 567, ch. 153; Jan. 30, 1925, 43 Stat. 798, ch. 115, § 1.)

STATEMENT OF THE CASE

On January 22, 1968, following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of rape, 22 D.C. Code 2801. At the time of trial, the rape statute provided that the jury could impose capital punishment for rape if it found the defendant guilty. The Government did not seek the death penalty. Nevertheless, the case was tried as a capital case. The jury was chosen only from those willing to impose the death penalty in case of a guilty verdict (A. 13, 18). The Court charged the jury that they could sentence petitioner to death and that if they were unable to agree on the death penalty they should merely return a verdict of guilty (A. 298). On February 23, 1968, petitioner was sentenced to a period of imprisonment of from six to eighteen years.

Petitioner appealed to the Court of Appeals for the District of Columbia which, on June 20, 1969, affirmed his conviction two to one, Senior Judge Fahy dissenting. On August 4, 1969, petitioner filed with the Court of Appeals a Petition for Hearing and Suggestion for Rehearing En Banc (A. 317). The Court of Appeals entered an order assigning the case for rehearing en banc but without further argument and briefing, and on March 23, 1970 entered its Opinion on Rehearing En Banc affirming petitioner's conviction (A. 328). Four of the Judges on the Court of Appeals dissented on the ground that the evidence was insufficient to sustain petitioner's conviction and three dissented on the separate ground that the death sentence instruction was prejudicial error, citing *United States v. Jackson*, 390 U.S. 570 (1968).

Following the opinion of the Court of Appeals on Rehearing En Banc, petitioner filed a Petition for Certiorari, *pro se*, on May 18, 1970 (after this Court had granted petitioner's request for an extension of time). The petition for certiorari, together with the Motion For Leave to Proceed in Forma Pauperis, were granted on October 19, 1970 (A. 349). This, then, is a direct appeal from petitioner's conviction for rape.

Petitioner's conviction rests upon the testimony of the complaining witness (Mrs. Louella Mayes) not significantly strengthened by the testimony of others. The complaining witness was employed as a nurse at St. Elizabeth's Hospital. She was on her way to work between the hours of 6:00 and 7:00 a.m. on the morning of January 22, 1967 when her car became disabled near a gas station. Petitioner drove into the same station and was asked by the attendant to assist the complaining witness by pushing her car with his car to a parking place on the grounds of St. Elizabeth's near the building where she worked. He did so. The complaining witness testified that as she was getting out of her car, petitioner attempted to push her back, telling her to move over. When she replied that she was unable to move over because of the "console" barrier, she testified that petitioner pulled her from her car into his car (A. 28). There was no outcry, no word of protest or act of resistance. The complaining witness testified further that they drove off in petitioner's car; that petitioner told her that she would not be hurt if she did not scream; that they stopped at a service station where petitioner bought some gas, where she made no outcry, sought no help and offered no protest or uttered no sign to attract the attention or assistance of the gas station attendant (A. 29, 55, 58); that they left the gas station and drove to a secluded spot; that petitioner made no advances until after they had talked for a while and she told petitioner that she did not love her husband (A. 30, 60). She removed her underclothes without resisting when requested to do so and did not ask petitioner to stop.

The complaining witness also testified that petitioner drove her back to St. Elizabeth's where she made no effort to cry out, call the police or have petitioner apprehended. He offered to return that afternoon with battery cables to help start her car and she gave him her car keys. He gave her his correct phone number and a name – Charles – which was written on a piece of paper supplied by the complaining witness. She testified that she went immediately to her supervisor to report the incident (A. 33, 68), but her supervisor testified that when she arrived she asked for the day off because she did not feel that she could perform her duties and only later did she report being "accosted" (A. 174-175). Petitioner returned that same afternoon to the parking lot, with battery cables, as promised, and was promptly arrested and charged with rape. He freely admitted to police officers that he had pushed the complaining witness' car that morning and that he had returned to help start it.

At the trial, petitioner took the stand in his own defense and denied that sexual intercourse took place (A. 206). Issue was joined both as to whether intercourse had taken place and as to whether the prosecution had made out a prima facie case of lack of consent. In his closing arguments to the jury, the prosecutor ridiculed petitioner's position as follows: "Again he says there was no crime, and if she was raped, it was consent, and if it was consent, regardless, his man didn't do it." (A. 263).

SUMMARY OF ARGUMENT

United States v. Jackson, 390 U.S. 570 (1968) held the death sentence provision of the Federal Kidnaping Act unconstitutional. In reaching its decision in *Jackson*, this Court cited with approval a decision of the Supreme Court of Nevada which held unconstitutional the death penalty provision of the Nevada rape statute (*Spillers v. State*, 84 Nev. 23 436 2d 18 (1968)). The death penalty

provision of the D.C. rape statute is subject to the same infirmities as those considered in *Jackson* and *Spillers* and is likewise unconstitutional. The Court of Appeals for the District of Columbia so held in *Bailey v. United States*, 132 U.S. App D.C. 82, 405 F.2d 1352 (1968).

The trial of this non-capital case as a capital case infected petitioner's trial to his prejudice. The unconstitutional death sentence instruction gave the jury a choice of three verdicts: (1) not guilty; (2) guilty as charged; and (3) guilty with the death penalty and created the possibility that in finding petitioner "guilty as charged" the jury rendered a compromise verdict. This possibility was enhanced by the non-compelling evidence of guilt. Four of the nine judges on the Court of Appeals for the District of Columbia dissented on the ground that the evidence was insufficient to sustain petitioner's conviction. The error in giving the death sentence instruction was not harmless because it was constitutional error and not "harmless beyond a reasonable doubt." *Chapman v. State of California*, 386 U.S. 18 (1967). It strikes at the heart of the guilt-determining process.

The dissenting opinion below reasons that the guilty verdict here might have been a compromise resulting from consideration by the jury of the impermissible death sentence charge. This rationale has since been adopted by this Court in *Price v. Georgia*, 398 U.S. 323, 331 (1970). Although a double jeopardy case, the rationale of *Price* is indistinguishable from this case. Whatever the factual context, the legal damage is done when the jury is given an impermissible option to consider and thereby an opportunity to reach a compromise verdict. The majority decision below is, therefore, in conflict with this Court's reasoning in *Price*.

Whenever a jury is given the right to determine crime and punishment as is the case under the D.C. rape statute, it is unrealistic to rule out the possibility of compromise or to assume that questions of guilt and punishment are not commingled.

Finally, the prosecutor's closing arguments were prejudicial because they rediculed petitioner's alternative defenses which held the prosecutor to its burden of proving both elements of the alleged crime: (1) that intercourse took place between petitioner and the complaining witness and (2) that the complaining witness did not consent.

ARGUMENT

I. THE CONSTITUTIONALLY INVALID DEATH SENTENCE INSTRUCTION GAVE THE JURY AN IMPERMISSIBLE CHOICE OF VERDICTS

A. This Court's Decision in *United States v. Jackson* Rendered Unconstitutional the Death Penalty Provision of the D.C. Rape Statute

This case was erroneously tried as a capital case and petitioner's constitutional right to a fair trial was prejudiced thereby. At the time of trial the rape statute in the District of Columbia (22 D.C. Code 2801) provided in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will, * * * shall be imprisoned for not more than thirty years: *Provided*, that in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by electrocution: . . .[1]

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[1] The death penalty provision was in effect at the time of petitioner's trial. It was later declared unconstitutional on authority of *United States v. Jackson*, 390 U.S. 570 (1968) and ordered stricken from the statute. *Bailey v. United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968). Congress eliminated the death sentence for rape in the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §20, 84 Stat. 473, 600, amending D.C. Code Ann. §22-2801 (1970). The legislative history indicates that the background for the amendment is *United States v. Jackson* 390 U.S. 570 (1968).

The death sentence provision of the D.C. rape statute is indistinguishable from the death sentence provision of the Federal Kidnaping Act which this Court struck down in *United States v. Jackson*, 390 U.S. 570 (1968).[2] Indeed, the jury's discretion to recommend the death penalty is broader under the D.C. statute since it applies "in any case of rape" whereas the Federal Kidnaping Act authorizes the death penalty only "if the kidnaped person has not been liberated unharmed."

In *Jackson*, this Court found that the death sentence provision of the kidnaping statute violated an accused's Fifth Amendment right not to plead guilty and Sixth Amendment right to trial by jury. This Court said:

> . . . Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnaping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right. See *Griffin v. State of California*, 380 U.S. 309 (390 U.S. at 583)

and cited with approval (390 U.S. at 583) an opinion of the Supreme Court of Nevada which held unconstitutional a state penalty scheme giving the jury the right to impose the death penalty for forcible rape resulting in great bodily injury.[3]

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[2]The Federal Kidnaping Act, 18 U.S.C. 1201 (a) provides:

> Whoever knowingly transports in interstate * * * commerce, any person who has been unlawfully * * * kidnaped * * * and held for ransom * * * or otherwise * * * shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

[3]*Spillers v. State*, 84 Nev. 23, 436 P. 2d 18 (1968). By limiting the death penalty to "rape resulting in great bodily injury", the Nevada statute rates higher marks in making the punishment fit the

Based on *Jackson*, the Court of Appeals for the District of Columbia found the death sentence provision of the D.C. statute unconstitutional in *Bailey v. United States*, 132 U.S. App. D.C. 82, 405 F.2d 1352 (1968).[4] The question here, therefore, is whether the trial of this case as a capital case, including the constitutionally invalid death sentence instruction to the jury, was prejudicial error.

The dissenting opinion of Senior Circuit Judge Fahy found prejudicial error in this trial procedure and would order a new trial:

> . . . I think he is entitled to a new trial because the jury was erroneously permitted to consider the case as one in which the death sentence was permissible. At the beginning it was impressed upon the jury that this was a capital case, and again when the court so charged the jury as the trial was ending. The jury was deliberately chosen only from among those willing to attach the death penalty in case of a verdict of guilty, and the court

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crime than the D.C. statute. Compare *Ralph v. Warden*, F.2d , No. 13,757 (4th Cir. decided December 11, 1970).

[4]The majority opinion in *Bailey* would limit the pronouncement of unconstitutionality of the death penalty to "only those defendants whose trials began after the *Jackson* decision, *id est*, after April 8, 1968." 405 F.2d at 1359. Certiorari was not sought in *Bailey*. Petitioner's trial took place in January 1968 and his conviction was pending on direct appeal to the Court of Appeals when *Jackson* and *Bailey* were decided. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc filed August 4, 1969 with the Court of Appeals argued, *inter alia*, that he was prejudiced by the death sentence instruction (A. 317, 323). Thus, petitioner is not seeking retrospective application of the *Jackson* rule because this is a direct appeal from a not yet final conviction which must be decided on the basis of presently existing law. *Linkletter v. Walker*, 381 U.S. 618 (1965). Even if this were a collateral attack on a final judgment of conviction *Jackson* should be applied retrospectively since the trial of this case as a capital case and the erroneous death sentence instruction undermined "the very integrity of the process" that decided petitioner's fate. Cf. *Witherspoon v. State of Illinois*, 391 U.S. 510, 523 (1968).

> charged the jury that although the Government was not seeking the death penalty, 'you may, if you wish to do so, add the words, "with the death penalty," to your verdict of guilty, if you find him guilty.' [Footnote omitted][5] (426 F.2d at 659)

The dissent concludes:

> We cannot surmise there was no likelihood of the jury considering the availability to them of the death sentence. We have no basis for such a surmise; and it is the erroneous availability of the death sentence, not the likelihood of its rendition, that gives rise to the prejudice. It may have exerted an undiscernible influence on jurors in deciding whether to find guilt, but without the death sentence, or not guilty. One or more jurors, with his or her attitude about the crime of rape reinforced by the statutory provision for a death sentence, might have been so influenced. As stated by the Second Circuit in *Wilkins, supra*, 348 F.2d at 867, it is sufficient if there is 'a reasonable possibility' of prejudice.
>
> For the court erroneously to give the jury a range of verdicts more severe than the law allows in the case on trial is for the court erroneously to influence the jury adversely to the accused. As a result the verdict rendered may be more severe than otherwise it would have been, even if not the most severe permitted by the erroneous instruction. (426 F.2d at 660-66)

As Judge Fahy points out "It is the erroneous availability of the death sentence, not the likelihood of its rendition,

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[5] Not mentioned in the dissenting opinion is the following portion of the charge:

> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty. (A. 298)

that gives rise to the prejudice" and the damage was done when the Court erroneously gave the jury "a range of verdicts more severe than the law allows in the case on trial." Not only did this instruction paint the crime as more heinous than it was but it gave the jury an impermissible option. The availability of the more severe verdict might have influenced the jury to render a guilty verdict not because they were convinced of appellant's guilt beyond a reasonable doubt, but as a compromise between finding defendant "not guilty" and recommending capital punishment. The jurors doubts might have been resolved by turning to the verdict which was less severe but which would not entirely acquit petitioner of guilt.

B. The Possibility of a Compromise Verdict Was Enhanced by the Non-Compelling Evidence of Guilt

Four of the judges on the Circuit Court of Appeals (Senior Judge Fahy, Chief Judge Bazelon and Judges Wright and Robinson) joined in Part I of the dissenting opinion which would reverse on the ground that the evidence was insufficient to sustain petitioner's conviction.[6] Even the majority opinion suggests that the evidence of guilt was less than compelling:

> . . . Admittedly, the trial and this record is not a model of symmetrical components — but difficult criminal trials seldom are; this is inherent when none but victim and attacker are present. What does emerge from the record, however, is the critical importance of credibility on the key issue of consent.
>
> * * *

[6] Petitioner contends that this is an independent ground for reversal for the reasons set forth in Part I of the dissenting opinion.

> . . . We cannot say their verdict on this point was without reasonable foundation, and whatever our own resolution might be were we to decide the fact issues – had we been the triers – this verdict was within the proper range of permissible alternatives for the finders of fact. (A. 313)

The bizarre circumstances surrounding the alleged crime are described in the dissenting opinion. Rather than attempt to argue anew the non-compelling nature of the evidence, we reproduce below the discussion appearing in the dissenting opinion annotated with record citations.

> Appellant's conviction rests upon the testimony of the complaining witness, not significantly strengthened by the testimony of others. She testified that she was a nurse at St. Elizabeth's Hospital. Driving to her work there one morning about 6 a.m. her car became sabled near a gas station. She went to a telephone booth and called her husband. At about the same time appellant drove into the same station and offered her his help, which she accepted. (A.27) With his car he pushed her car with her in it to a parking place on the grounds of St. Elizabeth's near the building where she worked. As she was getting out of her car appellant went over to it and pushed her back in, telling her to move over so he could come in on the same seat.[1] She pointed out the "console" barrier which prevented this (A.28). He then took hold of her arm and pulled her into his car. There was no outcry, no

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[1] Q. On cross-examination the complaining witness responded to questioning about this as follows: (R. 52)

Q. Now, what did you say, if anything, when he pushed you back in?

A. I don't remember saying anything.

She repeated this. Then this occurred:

A. He told me to move over.

Q. What did you say in response to that, if anything?

A. I said I couldn't move over.

word of protest, no word or act of resistance.[2] Still holding her arm he drove off to a service station telling her on the way that she would not be hurt if she did not scream.[3]

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[2]On cross-examination she answered defense counsel's inquiries as follows: (A. 55)

Q. Did you scream at any time from the time he took you from your car to his?

A. No I didn't.

Q. Did you make any noise?

A. No I didn't.

[3]She also testified that "he said that he knew I was scared because I was so nervous" and that she explained her condition to appellant as follows: "I told him I had a thyroid condition and this made me nervous anyway."

He stopped at a nearby gas station and there put his arm around her neck. The gas station attendant came right up to the car window. Appellant took money out of his pocket and paid through the window. Her mouth was free; only his arm was around her neck. No protest. No resistance. No word uttered or sign made (A.57-59). He drove off again to a secluded spot. On the way he told her where he worked and lived. Also during the ride he told her to take off her underclothes. No word of protest.[4] When they had stopped at the scene of the alleged crime he again told her that there would be no use in screaming and continued to converse with her. Responding to his questions, she told him she was married and had three children, but that she did not love her husband. He again

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[4]On cross-examination the complaining witness explained: (A. 61)

Q. Well, when he first asked you to take your underclothes off, what did you tell him, if anything?

A. I didn't say anything.

Q. You didn't say anything. You pretended like you didn't hear him?

A. I just didn't say anything.

told her to take off her underclothes and she complied (A.60-63). No word of protest. No importunity.[5] No force.

He drove her back to her place of work. He told her he would come back at three o'clock to start her car for her but she would probably have policemen. She said, "No, I wouldn't." He then asked her for the key to her car. She took it off the key ring and gave it to him. He asked her for a piece of paper to write on, which she gave him out of her purse. He wrote on it his correct phone number and a name – Charles – not his own, and gave it to her. She told him her name was "Luella." (A. 32) He did return as he said he would, with battery cables to help get her car started, and was arrested.[6]

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[5]She testified as follows on cross-examination: (A. 64)

Q. . . .Now, at any time during this entire time, did you ever tell him no?

A. No what?

Q. That you didn't want to do this, whatever he was going to do?

A. No, I only kept begging him to take me back to work.

Q. That's all. And you never said no; you never tried to stop him; you never put your hand up; and you never cried out. Is that correct?

A. He had told me if I wouldn't scream, he wouldn't hurt me.

[6]She testified that she went immediately to her supervisor to report the incident; (A. 33) however the testimony of her supervisor places her arrival in a different light. She testified that when the complaining witness arrived she was emotionally upset and asked for time off, explaining that she didn't feel that she could perform her duties. Later, in a private inner room, when the supervisor asked her what had happened and why she was late and thought she needed the day off she explained about being "accosted." (A. 173-175).

When confronted with a close question with respect to petitioner's guilt, the jury was particularly vulnerable to

any compromise suggestion. In this context, there is a real possibility that the jury reached a compromise between a verdict of guilty with the death penalty and a verdict of "not guilty" rather than continue the debate as to petitioner's innocence.

C. The Constitutional Error Was Not Harmless

The Government's memorandum in opposition to the granting of the Petition for a Writ of Certiorari concedes that the death sentence instruction was "erroneously before the jury" but suggests that the error was harmless since it related not to guilt but punishment. As we show below, this attempted distinction is more metaphysical than real: While it might have validity in other contexts,[7] it is meaningless when viewed in the framework of the D.C. rape statute which combines the issue of guilt with capital punishment and contemplates the weighing of both as part of a single verdict. More important, the error here was constitutional error which imposed "an impermissible burden upon the assertion of a constitutional right" (*United States v. Jackson*, 390 U.S. at 583). Like *Jackson*, the constitutional defect here strikes at the heart of the guilt-determining process to the extent that those who are not obviously guilty are induced to plead guilty under threat of the death penalty.[8] In short, the death sentence provision subjected petitioner to an unconstitutional condition upon the exercise of his constitutional rights.[8]

Given the fact that the error was unconstitutional in character, the law is settled and the test is clear. In *Chapman v. State of California*, 386 U.S. 18, 24 (1967) this Court held:

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[7] As, for example, in a bifurcated trial.

[8] Cf. Poe, *Capital Punishment Statutes in the Wake of United States v. Jackson: Some Unresolved Questions*, 37 George Washington Law Review 719 (1969).

> . . . that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.[9]

A declaration that the constitutional error here "was harmless beyond a reasonable doubt" is inherently impossible. To do so would require an inquiry into the deliberations of the jury in weighing the evidence of guilt and a determination that the jurors individually and collectively were not influenced by the death sentence instruction; that it did not serve as "make[s]weight[s] in a compromise verdict" *Jackson v. Denno*, 378 U.S. 368, 380 (1964) quoting with approval from *Stein v. New York*, 346 U.S. 156, 177-178 (1953) – an exercise which this Court properly has rejected.[10]

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[9] See also *Harrington v. California*, 395 U.S. 250 (1969).

[10] *Jackson v. Denno*, 378 U.S. at 379. See also *Kotteakos et al v. United States*, 328 U.S. 750, 764-765 (1945) which articulates the following standard with respect to nonconstitutional prejudicial error:

> . . . And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting. [citations omitted] . . . This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason . . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected . . . .

II. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN *PRICE V. GEORGIA*

The dissenting opinion of Judge Fahy explains how petitioner was prejudiced by the death sentence instruction. The majority decision below is silent with respect to the *Jackson* rule and the compromise verdict issue and disposes of the case on other grounds.

The possibility that a compromise verdict might result from a jury's exposure to an illegal charge was first pointed out in *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). In *Wilkins*, an instruction on first degree murder was given the jury in a case in which it was held the accused was not then triable for a crime more serious than second degree murder. The defendant was found guilty of second degree murder; nevertheless, the Court in an opinion by Circuit Judge Marshall, now Mr. Justice Marshall, stated:

> . . . [I]t is entirely possible that without the inclusion of the first degree murder charge, the jury, reflecting a not unfamiliar desire to compromise might have returned a guilty verdict on the first degree manslaughter charge on the same evidence. There is, of course, no basis for predicting with any confidence, that this would have been the outcome of the third trial if Hetenyi had not been prosecuted for first degree murder; but neither is there any basis for predicting, with any confidence, that this would not have been the outcome. To make this latter prediction on the basis of the sufficiency of the evidence would be to ignore reality and, in effect, to have judges make the choice entrusted to the jury. *Wilkins, supra*, 348 F.2d at 866.

The *Wilkins* rationale was adopted in a dissenting opinion by Mr. Justice Fortas in which Chief Justice Warren and Mr. Justice Douglas joined in *Cichos v. State of Indiana*, 385 U.S. 76 (1966). In *Cichos* the defendant was

tried for reckless homicide and involuntary manslaughter and was found guilty of reckless homicide which, under Indiana law, was the lesser offense. After the Supreme Court of Indiana granted a new trial, the defendant was again required to stand trial on both counts and again was found guilty of the lesser offense. This Court dismissed the writ of certiorari as improvidently granted in light of the Indiana statutory scheme and decisions of the Indiana Supreme Court holding that the defendant could not have been deemed to have been acquitted on the first count and that the second trial did not place him twice in jeopardy. The dissent by Mr. Justice Fortas stated:

> First, it exposed [defendant] to the hazards of prosecution and conviction for the more onerous offense. Second, it again gave the prosecution the advantage of offering the jury a choice – a situation which is apt to induce a doubtful jury to find the defendant guilty of the less serious offense rather than to continue the debate as to his innocence. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (C.A. 2d Cir. 1965), cert. denied, 383 U.S. 913 (1966). (385 U.S. at 81)

As pointed out in the opinion of Judge Fahy below:

> Though a dissenting opinion the majority of the Court cannot be said to have been in disagreement, since they disposed of the case on another ground, . . . (A. 345)

Between the first and second opinions of the Court of Appeals for the District of Columbia in this case, this Court in *Benton v. Maryland*, 395 U.S. 784 (1969) tacitly recognized the error implicit in placing an impermissible option before the jury and the possibility of a compromise verdict resulting therefrom but found no danger of a compromise verdict since the defendant

in that case was found guilty at the second trial of both offenses.[11]

The rationale of the *Wilkins* and *Cichos* cases with respect to compromise verdicts, however, was fully adopted by this Court in *Price v. Georgia*, 398 U.S. 323, 331-332 (1970) where Chief Justice Burger for a unanimous Court stated:

> Further, and perhaps of more importance, we cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious offense of voluntary manslaughter rather than to continue to debate his innocence. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844 (C.A. 2d Cir. 1965), cert. denied, *Mancusi v. Hetenyi*, 383 U.S. 913 (1966).

Wilkins and *Price* were double jeopardy cases in which the defendant at the first trial was convicted of the lesser included offense and thereafter had to stand trial a second time for the more serious offense. The error consisted of placing the defendant twice in jeopardy for the same crime and in permitting the constitutionally invalid charge of the more serious crime to be considered by the jury. The opinion of Chief Justice Burger in *Price* emphasizes that this is the stuff of which compromise verdicts are made. The mischief of the constitutionally invalid death sentence charge here is indistinguishable from the situation in *Price* because here, like in *Price*, "we cannot determine whether or not the [murder] charge against petitioner induced the jury to find him guilty . . . rather than to continue to debate his innocence." (398 U.S. at 331).

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[11] In Footnote 17 to its opinion, 395 U.S. at 798 this Court said:

> There is no danger here that the jury might have been tempted to compromise on a lesser charge because of an erroneous retrial on a greater charge. See *United States ex rel. Hetenyi v. Wilkins*, 348 F.2d 844, (C.A. 2d Cir. 1965), cert. denied, *sub nom. Mancusi v. Hetenyi*, 383 U.S. 913, (1966). Larceny is a lesser offense than burglary.

It is no answer to suggest, as the Government does in its reply to the Petition for Certiorari, that "here the matter erroneously before the jury related, not to the question of guilt or innocence, but to the separate issue of punishment." The D.C. rape statute makes no clear-cut distinction between the issue of guilt and punishment but merely gives the jury discretion to add the words "with the death penalty" to its guilty verdict. The jury had three possible verdicts: (1) not guilty; (2) guilty as charged; or (3) guilty with the death penalty. In this context, a guilty verdict may reasonably be viewed as a compromise between the two extremes, i.e., a conviction for the lesser included offense. Moreover, this Court's decision in *Green v. United States,* 355 U.S. 184 (1957) impliedly rejects the notion that punishment is a separate issue. Green had been tried in the District of Columbia for first degree murder and arson and convicted of second degree murder and arson. After a successful appeal, he was retried and convicted of first degree murder and arson and sentenced to death. This Court held that Green's appeal from this first conviction did not waive his Fifth Amendment rights against double jeopardy. Significant here is the fact that Green's second degree murder conviction was actually a conviction not for a lesser-included offense, *but only for an offense with a lesser punishment.* This results from the differences under the District of Columbia Code between first-degree murder and felony-murder such as that charged in *Green.*[12] While

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[12]D.C. Code, 1951, §22-2401. "Whoever, being of sound memory and discretion * * * without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in Section 22-401 * * * is guilty of murder in the first degree."

Section 22-2404 provides that the "punishment of murder in the first degree shall be death by electrocution."

D.C. Code, 1951, §22-2403. "Whoever with malice aforethought, except as provided in [§]22-2401 * * * kills another, is guilty of murder in the second degree."

[continued]

under the felony-murder doctrine, intent to kill is not a necessary element, so long as the act and intent to commit the felony (arson) are made out, intent to kill must be established by the prosecution for a conviction of second degree murder. Because second degree murder requires an intent not needed for a felony murder conviction, the former cannot be said to be included in the latter. Rather than a lesser-included offense, *Green* involved an offense with a lesser punishment.

It is unrealistic to assume a clear-cut dichotomy between crime and punishment in the minds of the jury. Here, the charge even suggested the possibility of a compromise verdict:

> If you do not wish to have the death penalty imposed, or if you are unable to agree that the death penalty should be imposed, then you should merely return a verdict of guilty; and the Court will impose an appropriate penalty in due course. (A.561)

Crime and punishment were tied up in a single package — as required by the terms of the statute.

United States v. Davidson, 367 F.2d 60 (6th Cir., 1966) is instructive with respect to the propensity of juries to be influenced by punishment in reaching a verdict. In that case, the foreman of a jury deadlocked for three days inquired of the trial judge as to whether the jury had the right to ask for leniency in the event of a guilty verdict. Within one half hour after the court responded in the affirmative, the jury found the defendants guilty with a recommendation for leniency. In reversing the convictions, the Court said:

> We conclude under all the facts and circumstances of this case that the trial judge's comments to the jury with reference to leniency was prejudicial to

§22-2404. "The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years."

> the defendants and that it was conducive to a compromise verdict. We can understand the reluctance of a trial judge to declare a mistrial, after a long and carefully tried case, because of the disagreement of the jury. However, in our system of jurisprudence it is bound to happen on occasion. The only safe procedure to follow is to limit the jury strictly to its function of determining the guilt or innocence of the defendant.[13] (367 F.2d at 65)

That compromise verdicts may arise in contexts other than double jeopardy cases was recognized by this Court's opinion in *Stein v. People of the State of New York*, 346 U.S. 156 (1953) and *Jackson v. Denno*, 378 U.S. 368 (1964). In *Stein* this Court reviewed the New York procedure of submitting confessions to the jury with instructions that the jury determine whether the confessions were voluntary and to disregard such confessions if found to be involuntary. This Court upheld the conviction because it found abundant evidence – apart from the disputed confessions – to convict. Mr. Justice Jackson writing for the Court criticized the New York procedure because of the

> . . . absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and defnite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard. Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage and forbid such practice . . . . (346 U.S. at 177-78)

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[13] Cf. *Andres v. United States*, 333 U.S. 740 (1948).

Jackson v. Denno, 378 U.S. 368 expressly overrules *Stein*. However, Mr. Justice White writing for the Court quoted with approval the above language from *Stein* (378 U.S. at 380) and embellished on the vice inherent in compromise verdicts:

> The danger that matters pertaining to the defendant's guilt will infect the jury's findings of fact bearing upon the voluntariness, as well as its conclusion upon that issue itself, is sufficiently serious to preclude their unqualified acceptance upon review in this Court, regardless of whether there is or is not sufficient other evidence to sustain a finding of guilt . . . . (378 U.S. at 383)
>
> Under the New York procedure, the evidence given the jury inevitably injects irrelevant and impermissible considerations of truthfulness of the confession into the assessment of voluntariness . . . As a consequence, it cannot be assumed, as the Stein Court assumed, that the jury reliably found the facts against the accused . . . The admixture of reliability and voluntariness in the considerations of the jury would itself entitle a defendant to further proceedings in any case in which the essential facts are disputed, for we cannot determine how the jury resolved these issues and will not assume that they were reliably and properly resolved against the accused . . . (378 U.S. at 386-387).

Enough has been said, petitioner submits, to invalidate his conviction as the product of an unconstitutional charge to the jury and a possible compromise verdict. The constitutional error is conceded; its effect upon the jury's deliberations in a close case cannot be minimized. In *Price* and other decisions discussed above, this Court has recognized compromise verdict possibilities in similar circumstances. The rationale of the minority opinion below is inescapable. *Price* has made it the law of the land.

Petitioner has raised the constitutional issue here in a direct appeal from his conviction. Whether other rape con-

victions under the same statute may be challenged in collateral proceedings need not here be determined. In any event, it does not appear that a reversal here on constitutional grounds would create a hardship upon the administration of justice.[14]

III. PETITIONER WAS PREJUDICED BY THE PROSECUTOR'S CLOSING ARGUMENTS MISCHARACTERIZING THE DEFENSE

Petitioner's defense at the trial presented two distinct issues: (1) whether the Government's case in chief as a matter of law established a prima facie case of rape; and (2) whether as a matter of fact intercourse had taken place. The defense did not argue that the complaining witness consented to intercourse with petitioner. It simply argued that taking the Government's evidence at fact value there was insufficient evidence that petitioner had carnal knowledge of the complaining witness 'forcibly and against her will.'

During the course of his closing argument, the Assistant U.S. Attorney misrepresented these permissible alternative defenses[15] and told the jury that appellant was asking that they believe "there was not crime, if there was a crime there was consent, and lastly, 'my man didn't do it.'" (R.259).

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[14]There have been 60 rape convictions in the District of Columbia during the last five years for which figures are available:

1969 – 18
1968 – 22
1967 – 10
1966 – 8
1965 – 2

Source: Administrative Office, United States Courts.

[15]The appropriateness of alternative defenses is settled (See *Whittaker v. U.S.*, 108 U.S. App. D.C. 268, 281 F.2d 631 (1960) and recognized in the opinion below. A.328,337.

In any effort to rationalize the jury's verdict in this case, these comments must be taken into consideration. The concept of alternative defenses in a rape case is difficult enough for lawyers to grasp; to expect a lay jury not to be influenced adversely to petitioner by these comments is to expect the impossible. If the jury accepted or was influenced by the characterization of the defense by the prosecutor, the entire credibility of petitioner's case was seriously prejudiced. A jury quite obviously would have been free to discount petitioner's testimony had he in fact said that no act of intercourse took place and Mrs. Mayes was a willing participant to that act of intercourse. However, this was not the testimony. Yet, it was precisely this impression that the prosecutor attempted to create.

During the closing argument, the prosecutor made the following remarks:

> Mr. Ianni has done a wonderful job of defending a phantom who, according to his testimony, never committed a crime because there was none committed; because he takes a sword, and he swings it at you both ways. He is saying to the jury that if it happened, there was consent. That is the first swing. But as he takes the sword and swings back the other way, he says this man didn't do it, he wasn't there. He's using a shotgun there, it's like standing back of a shotgun, the further you get back the wider the pattern grows. (A.258).
>
> * * *
>
> How can you argue finally when a man says there was no crime, if there was a crime, there was consent, and, lastly, 'my man didn't do it'? (A.259). Mr. Ianni would have you believe it was intimate love at first, . . . (A.262).
>
> * * *
>
> Can you argue a case against Mr. Ianni. Again he says there was no crime, and if she was raped, it was consent, and if it was consent, regardless, his man didn't do it. (A.263).

Not only do these remarks exceed permissible bounds of fair comment, there is not a single element of truth to them. Defense counsel never suggested an "intimate" love scene; never suggested that the complaining witness consented to sexual intercourse with petitioner; was not guilty of a "charade" or a "shotgun" defense. Petitioner did not testify that Mrs. Mayes *consented*, he testified that there was no intercourse (A.206). The defense was not that Mrs. Mayes consented, but rather that the Government had failed to prove lack of consent.

The difficulty with the prosecutor's misstatements is not that they distort petitioner's testimony but that they ridicule permissible alternative defenses to the crime of rape in a manner which affected petitioner's credibility in the minds of the jury. Petitioner had every right to insist that the Government prove both elements of the crime ("carnal knowledge" and "forcibly and against her will") without having his position ridiculed. By so doing, the prosecutor violated the standard of conduct prescribed by this Court for criminal prosecutions.[16] Such action is "offensive to the dignity and good order with which all proceedings in Court should be conducted." *Vierick v. United States*, 318 U.S. 236, 248 (1943). In *Corley v. U.S.*, 124 U.S. App. D.C. 351, 365 F.2d 884 (1966), the Court of Appeals ruled that where the Government's evidence was not strong, prejudicial statements by the prosecutor were sufficient grounds for reversal, even where defense counsel had not objected to the specific remarks in question. The factual context of *Corley* is similar to that in the instant case. In *Corley*, the prosecutor misstated testimony of certain alibi witnesses. Given the general weakness of the Government's case the Court concluded:

> But for the prosecutor's misstatements, the jury might well have found that the alibi testimony created a reasonable doubt. (365 F.2d at 885).

[16] *Berger v. United States*, 295 U.S. 78, 88 (1935).

Given the weakness of the Government's evidence on the consent issue, the misrepresentation by the prosecutor of the defense position may well have served to weaken or remove reasonable doubts the jury might have otherwise entertained.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed. In the alternative, the case should be remanded for a new trial as a non-capital case without the death sentence instruction.

Respectfully submitted,

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Supreme Court

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